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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1790~~ 70-246

DONALD RICHARD GOULET,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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No. .....

DONALD RICHARD GOULET,

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vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Petitioner, Donald Richard Goulet, prays that a writ of certiorari issue to review the judgment and decision of the Court of Appeal of the State of California, Second Appellate District, entered in the above entitled case on April 15, 1971.

Opinions Below.

The opinion of the Court of Appeal of the State of California for the Second Appellate District is not reported. A copy of the opinion appears in Appendix A hereto. The opinion of the Appellate Department of the Superior Court of the State of California, County of Los Angeles, is not reported. A copy of the opinion appears in Appendix B hereto.

Jurisdiction.

The judgment of the Court of Appeal of the State of California, Second Appellate District (Appendix A), was entered on April 15, 1971. The petition for hearing by the Supreme Court of the State of California was denied on May 13, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

Petitioner is an innocent person who is being subjected to the imposition of criminal sanctions under a judgment of conviction obtained contrary to petitioner's legal and constitutional rights. Petitioner has been subjected to such sanctions without the effective assistance of counsel and without the protection of a trial by jury and all other concomitant rights which petitioner never voluntarily and understandingly waived. The questions presented in the light of the undisputed record are:

1. Whether the provisions of California Penal Code §1018 and California Penal Code §311.2, as construed and applied to the petitioner herein to deny petitioner the right to withdraw his plea of *nolo contendere* and interpose a plea of not guilty to the charge made against him, deprive petitioner of his liberty and property without due process of law, deny petitioner the right of trial by jury in a criminal case, deprive petitioner of the right to the effective assistance of counsel, abridge the exercise of freedoms of speech and press and the right to be free from unreasonable searches and seizures, deny the equal protection of the laws, all contrary to the provisions of the First, Fourth, Sixth and Fourteenth Amendments to the United States Constitution.

2. Whether the provisions of California Penal Code §1018 and California Penal Code §311.2, as construed and applied to the petitioner herein to deny petitioner the right to withdraw his plea of *nolo contendere* and interpose a plea of not guilty to the charge made against him prior to sentence, when under an obscenity charge the then counsel for petitioner had actually not seen the motion picture film involved in the criminal proceeding; counsel had not discussed with petitioner the legal elements involved in the charge of obscenity; counsel was unable to advise petitioner whether the motion picture film was entitled to constitutional protection since he had not viewed the film; and counsel had in other respects neither advised petitioner of the legal counsequences of his plea under the obscenity statute, deprive petitioner of his liberty and property without due process of law, deny petitioner the right of trial by jury in a criminal case, deprive petitioner of the right to the effective assistance of counsel, abridge the exercise of freedoms of speech and press and the right to be free from unreasonable searches and seizures, deny the equal protection of the laws, all contrary to the provisions of the First, Fourth, Sixth and Fourteenth Amendments to the United States Constitution.

3. Whether the provisions of California Penal Code §1018 and California Penal Code §311.2, as construed and applied to the petitioner herein to deny petitioner the right to withdraw his plea of *nolo contendere* and interpose a plea of not guilty to the charge made against him prior to sentence, when in fact and in law the motion picture

film which was the subject matter of the charge against petitioner was actually not obscene and was entitled to constitutional protection, deprive petitioner of his liberty and property without due process of law, deny petitioner the right of trial by jury in a criminal case, deprive petitioner of the right to the effective assistance of counsel, abridge the exercise of freedoms of speech and press and the right to be free from unreasonable searches and seizures, deny the equal protection of the laws, all contrary to the provisions of the First, Fourth, Sixth and Fourteenth Amendments to the United States Constitution.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth, Sixth and Fourteenth Amendments to the United States Constitution and the provisions of California Penal Code, §§311, 311.2 and 1018, at the time of the plea, are printed as Appendix C hereto.

Statement.

On May 26, 1969, following a seizure of a motion picture film by police officers in a theater located in the City of Pasadena, County of Los Angeles, State of California, a complaint was filed in the Municipal Court of the said Pasadena Judicial District, alleging that petitioner and two other named individuals had willfully, unlawfully and knowingly exhibited such motion picture film in violation of §311.2 of the California Penal Code.

On July 16, 1969, petitioner appeared in the aforesaid Municipal Court by his then attorney, Howard Gershan. The petitioner thereupon entered a plea of

nolo contendere.[1] The aforesaid plea was found acceptable by the court, and the date of sentencing was fixed by the court for August 28, 1969.

How Federal Questions Are Presented.

Shortly after entering the aforesaid plea, and a month before the date of sentence, petitioner, on July 27, 1969, substituted his present attorney and moved the court to withdraw his former plea and to enter a plea of not guilty. Petitioner alleged in a sworn declaration that he entered his plea in ignorance of his constitutionally guaranteed rights; that to the best of his knowledge his prior attorney had never viewed the film involved in the case and had not advised him adequately concerning the constitutionally protected nature of the material. Petitioner alleged that he was advised by his present attorney that the seizure of the film was in violation of the applicable provisions of the United States Constitution; that the film appeared to be protected by the free speech and press provisions of the First and Fourteenth Amendments; that he had not been advised of the necessity for proof by the prosecution of knowledge of obscenity, and that he did not in fact know the material to be obscene, but that his prior attorney had never discussed this aspect of the case with petitioner; that petitioner would not have pleaded guilty if he had been advised by his prior attorney with respect to his rights as aforesaid; and that petitioner had been induced to plead guilty in large part by the hope that his co-defendants would be relieved of the

[1]The legal effect of such a plea is the same as that of guilty, but the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based. California Penal Code §1016(3).

heavy financial and emotional burdens in having to stand trial on the charges. The petitioner stated that he did not believe himself to be guilty of the offense and prayed the court for relief from the plea theretofore entered.

In addition to the aforesaid declaration in support of the motion to withdraw the plea, there was also submitted an affidavit of petitioner's present attorney, stating that petitioner had been advised by said attorney that in his opinon the search and seizure made in the case violated the constitutional provisions of the First, Fourth and Fourteenth Amendments; that the film appeared to be not obscene in the light of decisions of the Supreme Court; and that in the opinion of counsel the conduct of petitioner which formed the basis of his plea was protected by the federal Constitution.

The matter came on for final disposition before the Honorable Warren L. Ettinger, a Judge of the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California, on May 11, 1970. Prior to the aforesaid hearing, and on April 29, 1970, petitioner's prior attorney, Howard Gershan, submitted a sworn declaration in support of petitioner's motion to withdraw his plea of *nolo contendere*. A copy of the declaration of the prior attorney is annexed hereto as Appendix D.

In the appended declaration, the prior attorney declared that he was the attorney of record for petitioner at the time the plea of *nolo contendere* was entered;

that he had not seen the motion picture film charged in the complaint at the time petitioner entered his plea of *nolo contendere;* that prior to the entry of the plea he had not discussed with petitioner the legal requirements which must be met by the prosecution before a motion picture film can be declared obscene; that since he had not viewed the film, he was unable to advise petitioner of the constitutional and legal protections that the film might have under existing law; that he had not advised petitioner of the requirement of proof beyond a reasonable doubt of petitioner's knowledge that the film was obscene; that he had not advised petitioner that the search and seizure involved in the case were probably violative of constitutionally guaranteed rights; and that counsel had not advised petitioner prior to the entry of his plea that if he were to be convicted of a second violation of §311.2 of the Penal Code, any subsequent case could be construed as a felony by the courts rather than a misdemeanor.

On May 11, 1970, at the time of the hearing on the motion to withdraw the plea, the court had not only the aforesaid declaration by prior counsel and all other declarations by petitioner and subsequent counsel, as aforestated, but prior counsel also appeared and took the stand to testify that all the statements made in his declaration in support of the motion to withdraw the plea were true and correct to the best of his knowledge. At the conclusion of the said hearing, the court stated that petitioner had been adequately represented

and that the motion to withdraw the plea should be denied. The court thereupon imposed sentence upon the petitioner and ordered and adjudged that petitioner pay a fine in the amount of $500.00 to the clerk of the court, and if said fine were not paid, petitioner was to serve one day in the county jail for each $10.00 of said fine, not to exceed 50 days. In addition, a penalty assessment of $125.00 was imposed. Payment of the said fine has been stayed pending disposition of these proceedings.

Following the entry of the judgment and order of the Municipal Court of the Pasadena Judicial District, County of Los Angeles, on May 11, 1970, as aforestated, petitioner duly prosecuted an appeal to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. On January 22, 1971, the said Appellate Department rendered its decision, affirming the order of the municipal court (Appendix B). The Appellate Department held that petitioner had had "the benefit of representation and advice of competent counsel" and that the trial court "did not abuse its discretion" in denying petitioner's motion to withdraw his plea. A petition for rehearing and, in the alternative, for certification to the District Court of Appeal was duly filed by petitioner and was denied on February 4, 1971.

The aforesaid ruling of the Appellate Department was made despite petitioner's claims that the refusal to allow the withdrawal of petitioner's plea, when the re-

lief was requested prior to sentencing and was based on ineffective assistance of counsel, deprived petitioner of his constitutional rights under the First, Sixth and Fourteenth Amendments to the United States Constitution. It was further claimed that the motion picture film involved was not obscene but, on the contrary, was expression protected by the free speech and press provisions of the federal and state Contitutions and that the obscenity statute, as construed and applied to petitioner by the judgment of conviction, violated the free speech, due process and equal protection provisions of the state and federal Constitutions.

On April 6, 1971, petitioner filed a petition for writ of prohibition and mandate in the Court of Appeal for the Second Appellate District. The petition set forth all of the aforementioned allegations contained in the petition herein, including the declaration of prior counsel and the opinion of the Appellate Department as annexed hereto, alleged the innocence of petitioner, and requested issuance of the writ in the light of the applicable legal and constitutional principles aforestated.

On April 15, 1971, the Court of Appeal for the Second Appellate District, Division Four, by a *per curiam* opinion, denied the petition for the writ (Appendix A). The court held that in light of the Appellate Department decision, petitioner had failed to state facts sufficient to entitle him to relief. The Court of Appeal disregarded an undisputed record which clearly dem-

onstrated that petitioner had been without the effective assistance of counsel at the time of his plea; that petitioner had never knowingly and intentionally relinquished his constitutional rights to a trial; and that these undisputed facts were plainly averred in the petition and in the transcripts of proceedings.

On or about April 22, 1971, petitioner filed a petition for hearing before the Supreme Court of the State of California after the decision by the aforesaid District Court of Appeal denying the petition for prohibition and mandate. Petitioner contended, among other things, that California Penal Code §1018, which permits the withdrawal of a plea of guilty on application of defendant at any time before judgment, and California Penal Code §311.2, as construed and applied to the petitioner, deprived petitioner of his liberty and property without due process of law, denied the right of trial by jury in a criminal case, deprived petitioner of the right to the effective assistance of counsel, abridged the exercise of freedoms of speech and press and the right to be free from unreasonable searches and seizures, all contrary to the provisions of the First, Fourth, Sixth and Fourteenth Amendments to the United States Constitution. The petition for hearing was denied without opinion on May 13, 1971, by the Supreme Court of the State of California.

REASONS FOR GRANTING THE WRIT.

1. It is undisputed that petitioner's attorney at the time of plea to an obscenity charge had not viewed the motion picture film which was the subject matter of the complaint. It is also undisputed that petitioner was in no respects advised of crucial defenses which he possessed under the law and the Constitution to the charge made against him. Moreover, petitioner had not been advised of the legal consequences which flowed from the plea made by petitioner. The line drawn by the courts between alleged obscene material and constitutionally protected material has been stated to be dim and uncertain. It is impossible to conceive that a court or jury could make a determination with respect to the obscenity or nonobscenity of a motion picture film without viewing the film. It is equally impossible for counsel in an obscenity prosecution to effectively advise the client without viewing the film involved. On the undisputed record, petitioner was denied the effective assistance of counsel. See, *Powell v. Alabama,* 287 U.S. 45; *United States v. Joslin,* 434 F. 2d 526 (D.C. Cir. 1970); *United States ex rel. Kent v. Maroney,* 435 F. 2d 1020 (3 Cir. 1970); *United States v. Simpson,* 436 F. 2d 162 (D.C. Cir. 1970); *Ginsberg v. New York,* 390 U.S. 629, 676-707, opinion of Justice Harlan.

2. The right of an accused to trial by jury has a favored place in the law. The procedural and substantive due process guarantees which are implicit in such a trial are entitled to exacting protection by the courts. The public interest in protecting the right of an accused to such trial, especially in an obscenity prosecution, is great. In the case herein, petitioner's motion to withdraw his plea was submitted before sentencing and

within an extremely short period after his plea of *nolo contendere.* Petitioner cannot be deemed to have intentionally relinquished or abandoned rights to which he was entitled. The undisputed testimony of petitioner's counsel at the time of the plea indicates that petitioner did not understand the meaning of the charge made against him, did not know what acts amounted to being guilty of the charge, nor did petitioner understand the consequences of his plea of *nolo contendere. Boykin v. Alabama,* 395 U.S. 238; *Johnson v. Zerbst,* 304 U.S. 458; *Kadwell v. United States,* 315 F. 2d 667 (9 Cir. 1963); *Spradley v. United States,* 421 F. 2d 1043 (5 Cir. 1970).

3. California specifically provides a right to withdraw a plea prior to judgment (California Penal Code §1018). Plainly, this statutory right is entitled to all legal and constitutional protection. The courts have always drawn a sharp distinction between an application to withdraw a plea prior to sentence and an application made long after judgment has been imposed. Before sentencing, the inconvenience to court and prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the right of the accused to trial by jury. Indeed, the entire process of plea bargains is undermined and tainted if an application for a withdrawal of a plea made before sentence is denied in violation of legal and constitutional rights and contrary to justice in the particular cause. *United States v. Joslin,* 434 F. 2d 526 (D.C. Cir. 1970); *United States v. Simpson,* 436 F. 2d 162 (D.C. Cir. 1970); *United States v. Norman,* 412 F. 2d 629 (9 Cir. 1969); *Kadwell v. United States,* 315 F. 2d 667 (9 Cir. 1963); *Spradley v. United States,* 421 F. 2d 1043 (5 Cir. 1970); *Kercheval v. United States,* 274

U.S. 220; *United States v. Langford*, 315 F. Supp. 472 (D.C. Minn. 1970); *United States v. Kelly*, 314 F. Supp. 500, 503 (D.C. N.Y. 1970).

The petitioner was entitled, as a matter of constitutional right, to withdraw his plea prior to sentence. Petitioner was denied the effective assistance of counsel, deprived of substantial defenses to the obscenity charge made against him, denied the opportunity to prove that the motion picture film was entitled to constitutional protection, and petitioner was innocent of the charges made against him. The plea was not made with full understanding of the consequences and was based on ignorance and omission. The petitioner never intentionally and voluntarily relinquished his legal and constitutional rights. On the other hand, the record shows no justification for the denial of the application to withdraw the plea. No countervailing interest of the court or prosecution weighed against withdrawal. Refusal to permit withdrawal of the plea was not in conformity with the spirit and letter of the fundamental law.

4. It has been held that "talismanic labels" are not a substitute for a consideration of the legal and constitutional questions raised by an undisputed record. *Cf., New York Times Co. v. Sullivan*, 376 U.S. 254. It is not sufficient, it is submitted, to state that petitioner "understood the consequences of his plea" and had the benefit of representation and advice of "competent counsel" when the record shows without dispute and by the admission of the then counsel that counsel never saw the subject matter of the obscenity prosecution and never advised the petitioner of his legal and constitutional rights.

The courts below ignored the undisputed record which bore the implicit admission of counsel that he had been ineffective in representation of petitioner. It is submitted that the withdrawal of a plea of guilty cannot be denied in any case where it is evident that constitutional rights would be maintained by permitting the defendant to plead not guilty instead. The law seeks no unfair advantage over a defendant, and the Constitution is watchful to see that the proceedings shall be fairly and impartially conducted. In the case herein, petitioner has averred that he is innocent of the charge made against him and he should have a fair opportunity for a defense. No possible injury could have resulted to respondent by allowing petitioner to withdraw his plea and substitute a plea of not guilty. This is a case where the subject matter of the charge made against petitioner involves a motion picture film ordinarily entitled to constitutional protection under the state and federal Constitutions. It has been stated again and again that the rules usually applied in criminal prosecutions are subject to stricter standards and limitations when sought to be applied in the First Amendment area. *Smith v. California,* 361 U.S. 147; *Quantity of Copies of Books v. Kansas,* 378 U.S. 205.

It is submitted, in the light of all the foregoing, that the provisions of California Penal Code §1018 and California Penal Code §311.2, as construed and applied to the petitioner herein, deprive petitioner of his liberty and property without due process of law, deny to petitioner the right of trial by jury in a criminal case, deprive petitioner of the right of effective assistance of counsel, abridge the exercise of freedoms of speech and press and the right to be free from unreasonable seizures, and deny the equal protection of

the laws, all contrary to the provisions of the First, Fourth, Sixth and Fourteenth Amendments to the United States Constitution.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and ruling of the Court of Appeal of the State of California, Second Appellate District.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Petitioner.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Judgment of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

Donald Richard Goulet, Petitioner, v. Municipal Court of Pasadena Judicial District, County of Los Angeles, State of California, Respondent. People of the State of California, Real Party in Interest. 2d Civ. No. 38231.

Filed: April 15, 1971.

THE COURT:

In light of the decision made by the appellate department of the superior court petitioner has failed to state facts sufficient to entitle him to relief. (*In re Swain*, 34 Cal.2d 300, 304.) The petition is denied.

Files, *P. J.*
Jefferson, *J.*
Kingsley, *J.*

APPENDIX B.

Judgment of the Appellate Department.

In the Appellate Department of the Superior Court of California, County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Donald Richard Goulet, et al., Defendants and; Donald Richard Goulet, Defendant and Appellant. Superior Court No. CR. A. 9507. Trial Court No. M93175.

On Appeal from the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California, Warren L. Ettinger, Judge (311.2(1) PC.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgement made and entered in the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed.

MEMO.

As a result of a plea bargain, appellant entered a plea of nolo contendere. The record indicates that he understood the consequences of his plea and had the benefit of representation and advice of competent counsel. The record also indicates that the terms of the plea bargain were put into effect. (For legality of plea bargains, see *People v. West* [1970] .....Cal.3d .....

[..... Cal. Rptr. ....., ... P.2d .....] [Crim. 14,-453].) The trial court did not abuse its discretion in denying appellant's motion to withdraw his plea.

January 22, 1971.

BY THE COURT.

/s/ VASEY.
Acting Presiding Judge.
Wong Judge.
Smith, Judge.

APPENDIX C.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The provisions of the Fourth Amendment to the United States Constitution are:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The pertinent provisions of the Sixth Amendment to the United States Constitution are:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

4. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

5. California Penal Code §311, at the time of the plea, provided as follows:

> "As used in this chapter:
>
> "(a) 'Obscene' means that to the average person applying contemporary standards, the pre-

dominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

6. California Penal Code §311.2, at the time of the plea, provided as follows;

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

7. California Penal Code §1018 provides in pertinent part as follows:

> "Unless otherwise provided by law every plea must be put in by the defendant himself in open court . . . On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.
>
> * * *
>
> "This section shall be liberally construed to effect these objects and to promote justice."

APPENDIX D.

Declaration of Howard Gershan.

In the Municipal Court of Pasadena Judicial District, County of Los Angeles, State of California.

People of the State of California, Plaintiff, vs. Donald Richard Goulet, et al., Defendants. No. M-93175. DECLARATION OF HOWARD GERSHAN IN SUPPORT OF MOTION TO WITHDRAW GUILTY PLEA AND TO ENTER PLEA OF NOT GUILTY. State of California, County of Los Angeles—ss.

HOWARD GERSHAN declares as follows:

1. I am an attorney at law, duly licensed to practice in the State of California.

2. I was the attorney of record for Mr. Goulet, the defendant in the within matter, at the time he entered his previous plea in this matter.

3. I had not seen the film charged in the complaint at the time Mr. Goulet entered his earlier plea of guilty.

4. At the time I discussed the case with Mr. Goulet, and at the time of his entering his plea of guilty, I did not discuss with him the legal requirements which must be met by the prosecution before a motion picture film can be declared obscene. In other words, I did not discuss with him the requirements that to be obscene the material in question must: (a) go substantially beyond customary limits of candor in the description of sex or nudity; (b) that the material must have as its predominant theme an appeal to the purient interest of the average person; and (c) that the material must be utterly without redeeming social importance.

5. Moreover, I did not discuss with Mr. Goulet prior to his entry of a plea in this matter the fact that each of the three tests must be met independently of the other two before the material may be declared obscene.

6. Since I had not viewed the film charged herein, I was not able to advise Mr. Goulet of the film's possible protection under the requirements as set out above.

7. Furthermore, I did not advise Mr. Goulet that for him to be found guilty in this matter there would have to be proved beyond a reasonable doubt that he knew the film was obscene at the time it was exhibited.

8. I did not advise Mr. Goulet prior to his entry of a plea of guilty in this matter of the strong probability that the search and seizure involved in his case was violative of constitutionally guaranteed rights in that: there was no prior adversary hearing in the matter; the affidavit in support of the search warrant failed to set forth sufficient facts to support the issuance of a search warrant; and that the seizure of the film was violative of guarantees of the First, Fourth and Fourteenth Amendments to the United States Constitution.

9. I did not advise Mr. Goulet that under the provisions of Section 1538.5 et seq. of the Penal Code, if a motion to suppress the film as evidence were denied he would have a right to appeal that denial through the appellate courts before being required to go to trial in the matter.

10. I did not advise Mr. Goulet prior to his entry of a plea of guilty in this matter that if he were to be convicted of a second violation of Section 311.2 of the

Penal Code that because of this prior conviction any possible subsequent case can be construed as a felony by the courts rather than a misdemeanor.

11. A major factor in a decision to enter a plea of guilty was the statement by the City Prosecutor's office that upon receipt of a plea of guilty the codefendants charged would have their cases dismissed.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on April 29, 1970, at Los Angeles, California.

Howard Gershan

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 14 1971
E. ROBERT SEAVER, CLERK

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Opposition to Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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IN THE

Supreme Court of the United States

October Term, 1970
No. 1790.

DONALD RICHARD GOULET,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Opposition to Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Respondent prays that a Writ of Certiorari to the judgment and decision of the Court of Appeal of the State of California, Second Appellate District, entered in the above entitled case on April 15, 1971, be denied.

Statement of the Case.

As set forth in the Complaint, *No. M 93175*, a part of the record, Petitioner is charged with exhibiting an obscene film at 2226 East Colorado Boulevard, in the City of Pasadena, California, on May 15, 1969, in violation of Section 311.2, of the California Penal Code, which is set forth in Petitioner's Petition, "Appendix C, par. 6". Petitioner has also quoted the California statutory definition of "Obscene", Sec. 311, in his "Appendix C, par. 5".

I.

A. On May 15, 1969, Vice officers of the City of Pasadena Police Department paid the $5.00 admission fee and viewed the film at the "Venus Theater". They then submitted their Affidavit for Search Warrant to a Municipal Court Judge. On May 19, 1969, the Judge personally viewed the film, together with the Vice officers, after each had paid the fee. Thereafter the judge issued the Search Warrant.

1. This was the second viewing by the Vice officers, the first for the Judge.

2. The Judge, after personally viewing the film and reading the Affidavit in Support of the Petition for Search Warrant; issued the Search Warrant on May 19, 1969. (*Flack v. Municipal Court* (1967), 66 Cal. 2d 981; 429 P. 2d 192).

3. The complaint was issued by the Pasadena City Prosecutor on May 26, 1969, upon the recommendation of the Judge and the request of the Vice officers.

4. On June 2, 1969, a plea of not guilty was entered and the matter was set for Jury Trial on July 16, 1969.

B. Counsel for Petitioner at that time was Mr. Howard Gershan, a graduate of Loyola Law School in 1961, and duly licensed to practice law in the State of California since June 7, 1962.

1. Counsel for Petitioner (Defendant) reviewed the Complaint, Search Warrant, Affidavit and complete police report pertaining to the subject case and

discussed the same with the Assistant City Prosecutor, Mr. David Press. After being fully informed of the nature of the case, and the contents of the film from all the information given, Counsel for Petitioner (Defendant) stated that Petitioner (Defendant Goulet), as the owner and manager of the Venus Theater, would plead *nolo contendere,* if the City Prosecutor's Office would dismiss the charges against the other two named defendants in the case. This offer was accepted by the Office of the Pasadena City Prosecutor.

2. The Reporter's Transcript for July 16, 1969, pages 3 to 6, fully sets forth the Court's acceptance of the *nolo contendere* plea on that date, and the People's motion to dismiss as to the other two defendants in reliance upon this agreement.

3. The Reporter's Transcript of May 11, 1970, sets forth one of the hearings on Petitioner's (Defendant's) motion to withdraw his former plea of "*nolo contendere*".

4. The Certified Copy of the "Trial Court's Docket Sheets Showing the Record of Each Proceeding in the Municipal Court", pages 2 and 3, (8-21-69); page 4, (1-20-70); page 5, (4-30-70 and 5-11-70), show that Petitioner (Defendant) had made the same motion to withdraw his plea of *nolo contendere* prior to his motion of June 11 (Docket Sheets, page 6, (6-11-70), and that on each occasion the motion was duly heard and denied by the Trial Judge.

5. Counsel for Petitioner has stated with substantial accuracy the results of the proceedings held in the

Appellate Department of the Superior Court of the State of California. (Pet. App. B). We note, however, that the citation of "People v. West" included therein is incomplete. That citation is: *3 Cal. 3d 595.*

6. He has accurately stated the results of the proceedings before the Court of Appeal, Second District; and the California Supreme Court.

C. The film, together with the entire record of the proceedings, is available for examination by this Honorable Court. Respondent has officially requested the "clerks in possession" of the various portions of the record to certify and transmit the complete record for that purpose, under the provisions of Rule 21, (1) and (2), of the Rules of the Supreme Court of the United States.

ARGUMENT.

I.

The Seizure of the Film in the Instant Case Was Not in Violation of Any Provision of the United States Constitution. The Search and Seizure Made in the Case Did Not Violate the Constitutional Provisions of the First, Fourth and Fourteenth Amendments.

The Vice officers viewed the film in its entirety and were of the opinion that it was obscene within the rules laid down by this Court and the California Supreme Court. They then were sent by the City Prosecutor to consult one of the trial judges. They prepared an Affidavit for Search Warrant, together with a detailed police report which described the film in detail. The trial judge went with them to the theater and personally viewed the entire film himself. He then issued the Search Warrant, based upon the information supplied in the Affidavit and the description of the film, together with his own personal observation of the contents of the film. Having made his opinion that the film was obscene known to the City Prosecutor, the Complaint was thereafter issued.

The Affidavit for Search Warrant, the Search Warrant, the descriptive report of the Vice Officers, and the Complaint are a part of the record we have asked to be transmitted to the Court.

Thoroughly familiar with the federal cases in point, which are discussed and cited therein, the Supreme Court of the State of California decided in 1967 that police officers and prosecutors lack the capacity to determine what is or is not obscene, in *Flack v. Municipal Court*, 66 Cal. 2d 981; 429 P. 2d 192.

> "Determination by police officers of the status of suspected books, papers, etc. (including films)

—whether to be classified as obscene or not obscene—is not enough protection to the owner to constitute due process."

"Thus, with the exception of a situation involving a legitimate emergency, even if the search is contemporaneous with an arrest, a search warrant must be secured prior to any search for or seizure of material alleged to be obscene."

Flack v. Municipal Court, supra, p. 991.

Since that decision, no allegedly obscene material of any kind has been seized by the officers of the Pasadena Police Department, and no Complaints have been issued by the City Prosecutor, without a prior determination by one of the trial judges that the subject matter was obscene. Those of us who bear the unenviable duty of enforcing the criminal laws of California can only presume that the judges of the California Supreme Court are qualified to interpret the federal decisions they purport to analyze.

In the *Flack* opinion, the court said, at page 992:

"The concept of placing an intervening impartial tribunal between the enforcing officer and his target is not alien to this court in cases having First Amendment overtones."

In reaching the conclusions arrived at in the *Flack* Case, the California Supreme Court considered and cited the following United States Supreme Court decisions:

Niemotko v. Maryland (1951) 340 U.S. 268.

Roth v. United States (1957) 354 U.S. 476, 485—which incidentally was still the law at the time of the

case before us now, and still is except as to conflict with *Stanley v. Georgia.*

Beauharnais v. Illinois (1952), 343 U.S. 250, 266;

Winters v. New York (1948), 333 U.S. 507, 510;

Chaplinsky v. New Hampshire (1942), 315 U.S. 568, 571-572;

Near v. Minnesota (1931), 283 U.S. 697, 716.

These cases are all authority for the proposition that *obscenity* does not come within the ambit of protection afforded to speech by the First Amendment, and the states remain free to suppress obscenity through the implementation of their police powers.

I repeat, the instant case arose and was filed before *Stanley v. Georgia* eroded *Roth v. United States.* And this is not a case involving mere private possession of obscene materials in a home. (Nor does Section 311.2 of the California Penal Code purport to prohibit or punish such private possession of obscene matter, for one's personal use.) It involves the commercial exhibition of an obscene film in a theater which was open to any member of the public who chose to pay the $5.00 admission fee.

II.

Prior Determination of Obscenity by the Court.

We are aware, as was the California Supreme Court in the *Flack v. Municipal Court* case, *supra,* at p. 986, that:

> "under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech."
>
> *Marcus v. Search Warrant* (1961), 367 U.S. 717.

But we respectfully submit that the procedure followed in the instant case filled the gap in procedure which was pointed out as defective in the *Marcus* case. It is our understanding that the Missouri procedure was disapproved of because it authorized a court to issue a warrant for search and seizure on the sworn affidavit of a police officer stating facts indicating that "obscene material" was being kept in a place or building, without any scrutiny by the court of any materials considered by the officers to be obscene, and leaving too much discretion to the officers as to the material selected.

Here, we repeat, the issuing judge personally viewed the film in question before issuing the search warrant for its seizure.

Counsel for Petitioner laments the absence of a "prior adversary hearing." But Counsel knows as well as we do that such a requirement amounts to a total injunction in so far as the enforcement of the obscenity laws are concerned. We have tried to hold such a hearing on many occasions, and although they demand them, defendants and their counsel refuse to participate in them by producing the film. A *subpoena duces tecum* will not induce them to bring the film to such a hearing. A protective order by the trial judge will not induce them to produce the film at such a hearing. A combination of *subpoena duces tecum* and protective order will not induce them to bring it to the hearing. Neither will a fine for contempt of either the protective order or the subpoena. When threatened with any other action within the discretion of the judge who sets the "prior adversary hearing", they routinely take the Fifth Amendment.

A judicial requirement that we must hold a prior adversary hearing before we can proceed in an obscenity case is an absolute ban on enforcement, because immediately upon the receipt of notice of the hearing every defendant invariably disposes of the film in question.

Nor have we been able to find any decision of the United States Supreme Court which specifically holds that a prior adversary hearing, as such, is an essential condition precedent to a lawful search and seizure

Any judge who still professes to believe that defense attorneys are acting in good faith when they demand a prior adversary hearing in obscenity cases is either hopelessly naive, or a willing partner to hypocrisy.

This may, in fact, be the basic reason the courts of California have repeatedly held that "a prior adversary hearing as to obscenity before any warrant to seize a motion picture alleged to be obscene is not essential."

People v. Donald Richard Goulet, et al. (1970), Superior Ct. No. CR A 9088;

People v. De Renzy (1969), 275 Cal. App. 2d 380; 79 Cal. Rptr. 777;

Monica Theater v. Municipal Court (1970), 9 Cal. App. 3d 1; 88 Cal. Rptr. 71.

The California courts have also held that the California procedure for reviewing seizures of obscene material is adequate and hence constitutional.

Holden v. Arnebergh (1968), 265 Cal. App. 2d 87; 71 Cal. Rptr. 401;

Aday v. Superior Court (1961), 55 Cal. 2d 789; 13 Cal. Rptr. 415.

Obscenity, in whatever form, is wholly unprotected by the free speech guaranty of the First Amendment, except that which one possesses for his personal or private use.

> *Roth v. United States,* 354 U.S. 476, 484-485; 1 L. Ed. 2d 1498, 1506-1507; 77 S. Ct. 1304.

The several states are free to regulate and suppress such matter by virtue of their constitutionally reserved police power, and courts will not hesitate to enforce any valid law against obscenity.

> *Jacobellis v. Ohio,* 378 U.S. 184, 202; 12 L. Ed. 2d 793, 806; 84 S. Ct. 1676.

It must follow then, that although great care must be taken to fully preserve First and Fourth Amendment rights of each defendant, those amendments should not be interpreted in such a manner as to deny to the State of California the power to enforce its obscenity laws. Any construction of a constitutionally granted right which prevents the enforcement of a constitutionally enacted criminal statute is itself a constitutional impairment.

The requirement of a prior adversary hearing before seizure of obscene film would constitute such a denial.

As an additional safeguard to defendants, beyond that heretofore enumerated, California provides for a "Pre-trial hearing" and the opportunity to challenge any search and seizure by the accused, through Penal Code Section 1538.5. Those portions of that section which deal with misdemeanor violations are included, and incorporated herein as Appendix A. (Pertinent parts only).

III.

Under California Penal Code Section 1018, in Misdemeanor Prosecutions Where the Accused Is Represented by Counsel, and a Plea of Guilty or "Nolo Contendere" Is Personally Entered by the Defendant, the Granting of a Subsequent Motion to Withdraw Such Plea Is Discretionary With the Trial Court.

Calif. Penal Code Section 1018, the pertinent provisions of which are set forth in Petitioner's "Appendix C (7)."

In the instant case, the accused was at all times represented by counsel. After consulting with counsel, accused personally entered his plea of "*nolo contendere*". Before accepting that plea, the trial judge inquired very carefully into his understanding of the nature of the plea and its probable results.

[See Reporter's Transcript of Proceedings on July 16, 1969, page 3, beginning with line 1, through line 26; page 5, lines 1 through 26; and page 6, lines 1 through 14.]

The trial court exercised its discretion reasonably and properly in denying defendant's subsequent motions to withdraw his *nolo contendere* plea.

People v. Fratianno (1970), 6 Cal. App. 3d 211, 85 Cal. Rptr. 755;

In re Mosley (1970), 1 Cal. 3d 913, 464 P. 2d 473.

"Penal Code Section 1018, stating that with certain exceptions "every plea must be put in by defendant himself in open court" placed the re-

sponsibility for entering a plea upon defendant and his counsel; and the trial court had no responsibility to conduct the defense of an accused represented by counsel."

People v. Coogler (1969), 71 Cal. 2d 153, 454 P. 2d 686.

"A plea of guilty is an admission of every element of the offense, so that no other proof is necessary, and a judgment entered upon such a plea is not reviewable on the merits, even though the judgment is appealable, unless there exists 'irregularities going to the jurisdiction or legality of the proceedings'."

People v. Warburton (1970), 7 Cal. App. 3d 815, 86 Cal. Rptr. 894.

As Counsel for Petitioner has pointed out in his Brief, a plea of "*nolo contendere*" amounts to a plea of guilty, by California Statute. *Penal Code Section 1016 (3)*. (See footnote on page 5 of Petitioner's Brief.)

"Mere advice or assurance by private attorney to defendant accused of crime will not vitiate plea entered in reliance thereon."

In re Atchley (1957), 48 Cal. 2d 408, 310 P. 2d 15;

People v. Rose (1959), 171 Cal. App. 2d 171, 339 P. 2d 954.

"Bad advice, persuasion or wilful false statements of fact by attorney selected by defendant will not suffice to vitiate plea of guilty."

People v. Croft (1955), 134 Cal. App. 2d 800, 286 P. 2d 479.

"To warrant setting aside a plea of guilty defendant must show good cause with convincing evidence."

People v. Bauman (1955), 131 Cal. App. 2d 595, 281 P. 2d 74;

People v. Moffett (1955), 137 Cal. App. 2d 626, 290 P. 2d 667.

We have stated the California law. We come now to *Boykin v. Alabama* (1969), 395 U.S. 238, 23 L. Ed. 274; 89 S. Ct. 1709:

Boykin v. Alabama, supra, necessitates a more precise showing on all phases of a guilty plea than mere inferences, however plausibly drawn from circumstances on the record, but this does not require the recitation of a formula by rote or the spelling out of every detail by the trial court. It only means that the record must contain on its face direct evidence that the accused was aware, or made aware, of his right to confrontation, to a jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of his plea. Each must be enumerated and responses elicited from the person of the defendant.

We submit that this was done in the instant case, as evidenced by the Reporter's Transcript of July 16, 1969, which is a part of the record.

Petitioner's plea was voluntary and in conformity with California law and practice.

In re Tahl (1969), 1 Cal. 3d 122, 460 P. 2d 449.

IV.

There Is No Satisfactory Showing That Petitioner's Attorney at the Time He Entered His Plea of Nolo Contendere Was Incompetent, or That Petitioner Was Inadequately Represented by Counsel; or That Any Representative of the Office of the Pasadena City Prosecutor Misled Him in Any Way; or That the Trial Judge Abused His Discretion in Denying the Motion to Withdraw His Plea.

1. Please see p. 13, Reporter's Transcript, for summary of proceedings; and p. 13, lines 26-27, *in re* the court's statement that there was not sufficient ground to grant the motion.

2. In addition, please see p. 14, lines 10-11; and p. 15, lines 12-13; and Mr. Daniel's statement as to Mr. Gershan's competence, p. 15, lines 23-28, through line 1, on p. 16.

3. The discussion *in re* Mr. Gershan's alleged incompetence continues on p. 16, lines 2-6; p. 19, lines 8-9.

4. Please see the cross examination by Mr. Press, Assistant City Prosecutor of Pasadena, P. 19, lines 23-28, *in re* Mr. Gershan's graduation from Loyola Law School in 1961, and license to practice law in the State of California since June 7, 1962.

5. Please see p. 20, R. T. of May 11, 1970, lines 7-13, *in re* Mr. Gershan having read and discussed the City Prosecutor's file and the police reports of the Pasadena Vice officers. Also p. 20, *in re* his discussion with Mr. Press, particularly lines 23-28, and line 1, on p. 21.

6. Please see p. 21 *in re* the question by the court, and Mr. Gershan's answer, "I was", and the further questions by the court, together with Mr. Gershan's answers, lines 8-28 and line 1, on p. 22. See also lines 2-10, on p. 22, *in re* the court's question, and Mr. Gershan's answer, "Generally, yes."

7. Please see also p. 22, lines 12-14, and lines 1-4, on p. 23; also lines 5-10, and line 13, for the advice of Mr. Gershan to his client.

8. Please see R. T. of May 11, 1970, p. 25, lines 16-21, and lines 22-27, *in re* Mr. Gershan's "lack of a specific recollection" *in re* a possible future felony charge.

It should be noted at this point that at that time the California Penal Code required two prior convictions in order for the third to be considered as a felony. The statute has since been amended to require only one prior conviction.

9. The court's ruling appears on p. 26, lines 4-8, and lines 11-18.

10. The motion to dismiss as to Petitioner's two employees who were charged with the same offense was granted by the court, as a result of the "plea bargaining" heretofore mentioned, on p. 27, lines 22-27.

11. On p. 11, of Petitioner's Brief, Counsel for Petitioner asserts that it is "impossible for counsel in an obscenity prosecution to effectively advise the client without viewing the film." He sets this forth as his number one ground for granting the writ.

12. On p. 5, Counsel for Petitioner indicates that he had subsequently advised Petitioner that the film in question "appeared to be protected by the free speech and press provisions of the First and Fourteenth Amendments."

13. On p. 9, Counsel for Petitioner states that "It was further claimed (before the Appellate Department of the Superior Court) that the motion picture film involved was not obscene . . ."

The only inference which may be drawn is that Counsel is making that same representation to this Honorable Court.

Yet Counsel for Petitioner, himself, has not viewed the film in question. How then can he be critical of Petitioner's prior attorney who relied on the Affidavit for Search Warrant and the police report description of the film, together with the additional facts to make his own determination?

We respectfully submit that the film is the best evidence on this particular point. The trial judge viewed it personally before issuing the search warrant; and it is available for examination by this Honorable Court as well.

This film is not one of those "name films" such as "I am Curious Yellow" or "Black is Beautiful". It is what is commonly referred to as a "stag show film". The officer's description of it is included herewith as Respondent's Appendix B.

V.

Section 311.2 of the California Penal Code Is Distinguishable From the Statute Under Consideration in the Case of Stanley v. Georgia.

Petitioner challenges the constitutionality of California Penal Code Section 311.2 in so far as it applies to him.

That section was upheld by the California Court of Appeal in *Cohen v. Municipal Court* (1967), 250 Cal. App. 2d 861, 58 Cal. Rptr. 846, which decision is controlling unless overruled by implication in *Stanley v. Georgia* (1969), 394 U.S. 557. The statute involved in *Stanley v. Georgia* went much further than Penal Code Section 311.2. The Georgia law prohibits any possession of obscene material. The California law, on the other hand, prohibits only possession for sale, distribution, or exhibition. It is directed at commercial use. Stanley was prosecuted for private possession for his own personal use. The decision emphasizes the attempted invasion of the privacy of one's own home and thoughts. It distinguishes *Roth v. United States*, 354 U.S. 746 and the subsequent cases relying thereon on the ground that these "cases dealt with the power of the State and Federal Governments to prohibit or regulate certain public actions taken or intended to be taken with respect to obscene matter."

Thus, we conclude that *Stanley v. Georgia* does not apply to the California statute to render it unconstitutional.

VI.

In Challenging the Judgment of the Appellate Department of the Superior Court of the State of California and the California Court of Appeals, Second District, Counsel for Petitioner Has Failed to Overcome the Provisions of California Law by Which Both Courts Are Bound in re the Determination of the Competence of Counsel.

The evidence in this case shows no fraud, duress, mistake or denial of due process. (*People v. Caruso,* 174 Cal. App. 2d 624.)

To justify relief on the basis that counsel was inadequate, defendant must establish the attorney's incompetence. There was no such specific claim or showing.

People v. Robillard, 55 Cal. 2d 88, 97; 358 P. 2d 295;

People v. Wilson, 267 Cal. App. 2d 410, 414; 73 Cal. Rptr. 179;

People v. Evans, 270 Cal. App. 2d 594; 75 Cal. Rptr. 902.

No good cause was shown to allow withdrawal of the plea.

People v. Nat Lipton, CRA 8698.

There was no showing that the Trial Court did not properly and adequately consider the various motions for the withdrawal of the plea, which were continued from time to time by the court at the defendant's (Petitioner) request for the better part of a year. Hence there was no abuse of discretion, and in so far as the "plea bargaining" was concerned the People lived up to their promise to the letter.

People v. Barteau, 10 Cal. App. 3d 483.

The trial court had the duty and the discretion to determine the weight and the credibility of the affidavits of the defendant and his former counsel.

People v. Caruso, 174 Cal. App. 2d 624; 345 P. 2d 282.

Mere advice and persuasion or the expression of matters of opinion by the defendant's attorney will not suffice to vitiate the plea of guilty (or *nolo contendere*).

People v. Butler, 70 Cal. App. 2d 553; 161 P. 2d 401;

People v. Daigle, 194 Cal. App. 2d 340; 15 Cal. Rptr. 53;

People v. McDonough, 198 Cal. App. 2d 84; 17 Cal. Rptr. 643.

Upon a plea of "*nolo contendere*", the question of establishing obscenity through an expert witness qualified on statewide contemporary standards is not reached or in issue.

However, a reading of the police report description of the film, together with the Affidavit in Support of Search Warrant, plus the fact of personal viewing by the trial judge and his experienced determination that the film was "obscene" is sufficient evidence that it went beyond that standard to sustain the rulings of the Appellate Courts. Defendant's conduct in knowingly exhibiting the film to paying customers in a commercially operated theater took him out of the protection afforded by *Stanley v. Georgia.* Petitioner was in violation of Section 311.2 of the California Penal Code. There was no error, or deprivation of Petitioner's constitutional rights, on the part of any of the California courts.

Conclusion.

For the foregoing reasons, a Writ of Certiorari to review the judgment and decision of the Court of Appeal of the State of California, Second Appellate District, entered in the above entitled case on April 15, 1971, should be denied.

Respectfully submitted,

BYRON B. GENTRY,
Pasadena City Prosecutor,
Attorney for Respondent.

APPENDIX A.

Pertinent Provisions of California Penal Code Sec. 1538.5.

"Sec. 1538.5. Motion for return of property or suppression as evidence; Special hearings: New complaint or indictment: Appeals: Review by mandate or prohibition: Stay of proceedings: Dismissal of action: Release of Defendant: Bail: Motions based on freedom of speech or press.

"(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds: (1) [not pertinent.]

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards."

"(b) When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant. . ."

"(c) Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion."

"(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people."

"(e) & (f)" [not pertinent.]

"(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. . . ."

"(h) If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court."

"(j)—[provides among other things for the right of appeal.]

"(k), (l), (m), (n) & (o) [provide for all other possible contingencies and rights.]

APPENDIX B.

Officer's Description of the Film.

Pasadena Police Department, Pasadena, Calif.

Investigation Report PPD Form, 112.

Classification PC 311.2 Exhibiting Obscene Matter.

Date of this report 5-15-69.

Case Number 604 297.

Reference to: 2226 E. Colorado Blvd., The Venus Theatre.

Acting on information that possible lewd films were being shown at the Venus Theatre at the above location, Agent R. McCray and Agent R. Montoya of the Vice-Narcotic Section of the Pasadena Police Department, purchased admission tickets and entered the establishment to conduct an investigation. The price of admission was $5.00 per person and was collected by the two John Doe individuals listed on the preceding page. The entrance to the main portion of the theatre is against the west wall and the seating capacity will accommodate approximately 70 people. At the south portion of the interior is a movie screen which is approximately 8 feet high and approximately 10 feet in width. When the undersigned officers entered the seating portion of the structure, there were approximately 25 additional male patrons seated in the Theatre.

These officers entered the establishment at 9:30 PM and viewed two 15 minute segments of film which consisted of one nude female in each segment. The first film depicted a nude female on what appeared to be a couch placed against a wall and consisted of close up views of the vagina region as the subject sat, stooped and squatted in various positions. Portions of the film

also depicted the subject as she fondled her breasts with both hands and also rubbed the vagina area but did not touch anything other than the inner portion of the thighs. The second film depicted basically the same as the first with the exception of the subject being a different individual and the filming took place on what appeared to be a king-sized bed.

At approximately 10:00 PM, another 15 minute segment of film depicted a Female Caucasian with strawberry blonde hair, lying on what appeared to be a tiger skin cloth which had been placed on the floor. The subject was again completely nude with the exception of dark hose on her legs and black high heeled shoes on her feet. The female subject was filmed as she lay on the tiger skin cloth, on her back with her feet elevated and legs spread apart, thus giving a close up view of the vagina region as well as the anus. Several scenes revealed the individual as she took one of her breasts in her hand, pulled it upward and licked the nipple with her tongue. The subject took up several positions which completely revealed the anus and vagina area and on two occasions, she was lying on her back with her legs spread apart and she took the forefinger of each hand and spread the outer portion of the vagina, thus displaying the clitoris and on one of the scenes, she gyrated the inner vaginal wall while spreading the outer portion. Near the end of the segment, she was depicted lying on her back with her legs spread apart and twice she inserted the middle finger of her right hand into the vagina and pushed it in and out to the second joint of the finger. Although the segment of film was silent (Accompanied by recorded music), a close up view of the subjects face gave a clear impression of the mouth and lips and it was obvious to

anyone in the audience that she was saying "Fuck me, Fuck me, Fuck me." This portion of the film ended at 10:15PM, at which time there was a short intermission.

At approximately 10:20PM another segment of film was displayed which revealed several nude male and female subjects as they fondled each other and one scene depicted a male as he lifted a female in a manner which placed her vagina area against his mouth. Several other scenes depicted two female subjects as they fondled each others breasts and kissed one another on the mouth, as well as the breasts. Following this segment of film, The title "The Act of Love" appeared on the screen and identified it as a "Dragon Film". The camera man and the producer were also identified but are not known to these officers at this time.

This segment of film began by showing two fully clothed females seated on a bed, one of whom was blonde (Long Hair) and the other having long black hair. The Black-haired subject wore a white blouse, black trousers and had a red kerchief tied around her neck. The Blonde individual was attired in a gold colored sleeveless dress, which appeared to be a mini-dress. Conversation accompanied this segment of film but was of poor quality to the extent it was impossible to understand. There was some conversation at the beginning of the film, as the black-haired female unbuttoned her own blouse and then removed her trousers, revealing a pair of red briefs. She then reached around behind the blonde, unzipped her dress and the blonde removed it, revealing her completely nude body. At this time the black-haired individual removed her own blouse and exposed a nude body with exception of the red briefs. The two subjects then embraced one an-

other, kissed each other on the mouth and fondled and kissed one anothers breasts as well as the stomach region. This activity continued during the entire segment of film and there were numerous views of the pubic and vagina regions of both females.

At approximately 10:40PM, another segment of film began which depicted four fully clothed females as they appeared to be standing in a living room of some type of dwelling. One of the females (Negro) referred to one of the caucasian girls as a lesbian in front of the two remaining caucasian girls. One of the caucasian girls appeared to be in charge of the group and on one occasion, she walked to the blond subject, pulled open the front of her dress, revealing her nude breasts and took the left one in her hand and kissed it. As the females stood talking, a male subject came to the door of the apartment and said he was an insurance adjuster which had come to the location to check a leak in the roof. Prior to his entry, the female which appeared to be in charge of the group, told the others to "Act like glamorous, sophisticated cunts". As the male individual sat on the couch by the female in charge, the remaining two caucasian girls removed their clothing and were completely nude. Shortly thereafter, the one in charge removed her clothing and they began removing the clothing of the male. Soon, all parties concerned were completely nude, with exception of the male which appeared to be wearing white jockey shorts. One of the nude caucasian females went to the male on the couch and as he sat upright, she climbed up on the couch in a position where it appeared as though her crotch area was against his mouth and she reached back and rubbed his penis through the underwear. As this activity continued between the male and female on the couch, the

two remaining female caucasians were on the floor, kissing each other on the mouth, fondling and kissing the breast of each other and one would place her leg between the legs of the other.

Two other scenes depicted the female negro and the female on the couch as they rubbed the penis of the male through his under shorts. As the film continued, the male was suddenly nude as well as the females and he was then filmed while lying on top of the female negro, who was lying on her back with her legs spread apart and the male was between her legs and moving up and down giving the impression of intercourse although the actual penetration was not viewed by the audience. The female negro stated she had had enough and the male then moved to the couch where he took a position with a female caucasian exactly as that described with the negro subject. Again, he moved up and down rapidly, simulating intercourse. The scene would change from the male and female subject on the couch to the two female caucasians on the floor who were again fondling and kissing each others breasts and one female moved her head to the crotch area of the other and kissed the inner thigh of the right leg and then kissed the pubic hairs. Several scenes showed one female with her head between the legs of the other but the hair was so long, it was impossible to determine actual copulation. As the film continued, the male was shown as he lay on the floor fondling the breasts of one female and kissed the thigh and pubic hairs of another female on the couch. As the two female caucasians on the floor continued their embracing and kissing, one female was depicted lying on her back and the other sat on top of her in a position where her vagina region was directly against that same region of the girl on the

floor. As the two continued placing their vaginas together, the female on the bottom said "Make me come Lulu, make me come."

This entire segment of film depicted the male as he fondled the breasts of the females in addition to the activity described above. The film ended at apprx. 11:05PM at which time the undersigned officers left the location.

It is the opinion of the investigating officers that the activity depicted in the film is lewd and obscene therefore a complaint and search warrant to confiscate the film are requested.

Case pending.

Agent R. McCray/Agent R. Montoya
Vice-Narcotic Section
Investigative Division

SUPREME COURT, U. S.

Supreme Court
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IN THE

Supreme Court of the United States

October Term, 1971
No. 70-246

DONALD RICHARD GOULET,

Petitioner,

vs.

MUNICIPAL COURT OF PASADENA JUDICIAL DISTRICT, COUNTY OF LOS ANGELES, CALIFORNIA,

Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Statement.

A guilty plea is "a grave and solemn act" which waives certain constitutional rights, and therefore must not only "be voluntary but must be knowing, intelligent" and "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742, 748. Since it is a part of a lawyer's obligation to prepare his client to enter a knowing, intelligent plea, petitioner contends that the advise of his original counsel to plead *nolo contendere* was not "within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson,* 397 U.S. 759, 771. Petitioner contends that his plea was not voluntarily and intelligently made in contemplation of law, and was therefore voidable under the Constitution and the interpretive decisions of this Court.

Respondent's opposition to the writ of certiorari fails to meet the substantial constitutional issues here presented and respondent's arguments reveal an undisputed record so far as the decisive issues here presented are concerned.

1. It is not disputed that the charge against petitioner was the knowing exhibition of a motion picture film in violation of the state obscenity statute, and that the attorney for the petitioner at the time the plea of *nolo contendere* was submitted had never seen the film.

The respondent emphasizes the seizure of the motion picture film by police officers without any prior adversary hearing and stresses that there was a "viewing by the Vice officers" (Resp. Opp., p. 2), and that there was also a "personal viewing" by the judge who issued the search warrant for the seizure of the film (*Id.*, p. 2). But despite the fact that the vice officers had viewed the film, and the judge had viewed the film, the attorney for the petitioner never saw the film and nevertheless advised petitioner to enter his plea to a charge of exhibiting an "obscene" motion picture film. (See, Decl. of Howard Gershan (Pars. 3-6); Pet. for Writ, App. D).

2. Prior to the entry of the plea petitioner was not advised by his counsel "of the strong probability that the search and seizure involved in his case was violative of constitutionally guaranteed rights" in that there was no prior adversary hearing before seizure (Decl. of Howard Gershan (Pars. 8-9); Pet. for Writ, App. D).

Respondent therefore spends considerable time in its opposition papers endeavoring to establish that the seizure of the film was not violative of the Constitution,

emphasizing that a prior adversary hearing was not constitutionally required (Resp. Opp., pp. 5-10).

Nevertheless, it is plain that the seizure of the motion picture film which was made without any prior adversary hearing was contrary to the Constitution and the applicable decisions of this Court. *Quantity of Copies of Books v. Kansas*, 378 U.S. 205; *Marcus v. Search Warrants of Property*, 367 U.S. 717. The requirement of a prior adversary hearing applies to film seizures as well as those of printed matter because there is the same danger of abridging the right of the public to unobstructed dissemination of nonobscene expression. See, *Bethview Amusement Corp. v. Cahn*, 416 F. 2d 410 (2 Cir. 1969), cert. denied 397 U.S. 920; *Tyrone, Inc. v. Wilkinson*, 410 F. 2d 639 (4 Cir. 1969), cert. denied 396 U.S. 985; *208 Cinema, Inc. v. Vergari*, 298 F. Supp. 1175 (D.C. N.Y. 1969), reversed in open court Oct. 9, 1969, ... F. 2d ..... (2 Cir.) Docket No. 33997, cert. denied 90 S. Ct. 941; *United States v. Alexander*, 428 F. 2d 1169 (8 Cir. 1970); *Cambist Films, Inc. v. Duggan*, 420 F. 2d 687 (3 Cir. 1969); *Metzger v. Pearcy*, 393 F. 2d 202 (7 Cir. 1968); *Demich, Inc. v. Ferdon*, 426 F. 2d 643 (9 Cir. 1970), vacated and remanded 91 S. Ct. 1223.

Yet petitioner was never advised by counsel of these substantive rights prior to plea.

3. It is not disputed that the time between the date of sentencing and the time when petitioner moved the Court to withdraw his plea and to enter a plea of not guilty was approximately 10 days, and a month before the date of sentence. It is therefore plain that no compelling state interest existed to justify a denial of petitioner's application for leave to withdraw his plea.

The inconvenience to court and prosecutor was minimal, while on the other hand petitioner had been advised by counsel to plead guilty to an obscenity charge without any viewing of the film by counsel and without any advice with respect to his rights against the patently illegal seizure of the film.

4. It is argued by respondent that this Court is bound by the state court judgments with respect to the issue of the effective assistance of counsel (Resp. Opp., pp. 18-19). This Court has held, however, that "We must 'make an independent examination of the whole record', . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion" into areas protected by the Constitution. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285. See also, *Chambers v. Florida*, 309 U.S. 227, 228-229; *Haynes v. Washington*, 373 U.S. 503, 515-516.

Conclusion.

Respondent's opposition only emphasizes the deprivation of constitutional rights to which petitioner has been subjected as the result of the ineffective assistance of counsel. Petitioner has been subjected to criminal sanctions, despite his claim of innocence, without the protection and guarantees of constitutional rights which petitioner never voluntarily or understandingly waived. It is submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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SAM ROSENWEIN,
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